No. 14-1382

IN THE

Supreme Court of the United States

AMERICOLD LOGISTICS, LLC, ET AL.,
Petitioners,

v.

CONAGRA FOODS, INC., ET AL.,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF REAL ESTATE INVESTMENT TRUSTS AS AMICUS CURIAE SUPPORTING REVERSAL

TONY M. EDWARDS
VICTORIA P. ROSTOW
NATIONAL ASSOCIATION OF REAL ESTATE INVESTMENT TRUSTS
1875 I Street, N.W.
Washington, DC 20006

WILLIAM M. JAY
Counsel of Record
GOODWIN PROCTER LLP
901 New York Ave., N.W.
Washington, DC 20001
wjay@goodwinprocter.com
(202) 346-4000

JAMES J. HANKS, JR.
VENABLE LLP
750 East Pratt Street
Baltimore, MD 21202

GILBERT G. MENNA
ETTORE SANTUCCI
DAVID R. FOX
GOODWIN PROCTER LLP
Exchange Place
Boston, MA 02109

Counsel for Amicus Curiae

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Emerald Inv. Trust v. Gaunt Parsippany Partners,
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Great S. Fire Proof Hotel Co. v. Jones,
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Homfeld II LLC v. Comair Holdings, Inc.,
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Mossman v. Higginson,
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Navarro Sav. Ass'n v. Lee,
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26 U.S.C. § 856(a)(3) (1964)..... 15

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28 U.S.C. § 1332(d)(2)(A) 2

28 U.S.C. § 1441(b)(2) 2

Internal Revenue Code of 1954,
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Act of Sept. 14, 1960,
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Tax Reform Act of 1976,
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Ohio Rev. Code Ann. §§ 1747.01–.99 17

Tex. Bus. Orgs. Code Ann. §§ 200.001–.503 17

LEGISLATIVE HISTORY:

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H.R. Rep. No. 85-1706 (1958) 30

H.R. Rep. No. 86-2020 (1960) 6, 15

Jurisdiction of Federal Courts Concerning Diversity of Citizenship: Hearing Before Subcomm. No. 3 of the H. Comm. on the Judiciary, 85th Cong. (1957) 10, 30

S. Rep. No. 85-1830 (1958) 30

S. Rep. No. 94-938 (1976) 16

PROCEDURAL RULES:

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OTHER AUTHORITIES:

Fed. Reserve Bd. of Governors, *Financial Accounts of the U.S.: Second Quarter 2015* 9

James J. Hanks, Jr., *Federally Tax-Qualified Real Estate Investment Trusts Formed Under Maryland Law* (2015), https://goo.gl/1MLNSX ..... *passim*

James J. Hanks, Jr., *Maryland Corporation Law* § 17.1 (Supp. 2015) 13, 22

NASDAQ Stock Market Rules, NASDAQ, http://nasdaq.cchwallstreet.com/ (last visited Nov. 11, 2015) 14

NYSE Listed Company Manual, NYSE, http://nysemanual.nyse.com (last visited Nov. 24, 2015) 14

Frank Packer et al., *Securitization and the Supply Cycle: Evidence from the REIT Market*, 39 J. Portfolio Mgmt. 134 (2013) 9

REITs in S&P Indexes, REIT.com, https://www.reit.com/investing/investor-resources/reit-directory/reits-sp-indexes (last visited Nov. 21, 2015)..... 14

BRIEF FOR THE NATIONAL ASSOCIATION OF REAL ESTATE INVESTMENT TRUSTS AS AMICUS CURIAE SUPPORTING REVERSAL

INTEREST OF THE AMICUS CURIAE

Amicus curiae The National Association of Real Estate Investment Trusts (NAREIT) is the worldwide representative voice for real estate investment trusts (REITs) and publicly traded real estate companies with an interest in U.S. real estate and capital markets. NAREIT's members are REITs and other businesses worldwide that own, operate, and finance income-producing properties, as well as firms and individuals that advise, study, and service those businesses.[1]

Many of NAREIT's members are, like petitioner Americold Realty Trust ("petitioner"), REITs organized under Title 8 of the Corporations and Associations Article of the Code of Maryland. And many of those REITs, unlike petitioner, are publicly traded—meaning that they have shareholders in all U.S. states, or nearly all. Adopting the Tenth Circuit's reasoning would treat those REITs as citizens of every one of those states for purposes of federal diversity jurisdiction. That would largely deprive those REITs of access to the federal courts sitting in diversity: they would be unable to remove actions to federal

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[1] The parties have consented to the filing of this brief. No counsel for a party authored any part of this brief; no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief; and no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the brief's preparation or submission.

court based on diversity, 28 U.S.C. § 1441(b)(2) (an action brought in state court in a state where any defendant is a citizen may not be removed to federal court based on diversity), and likely would not be able to establish even the minimal diversity required for removal of large class actions, *see* 28 U.S.C. § 1332(d)(2)(A). That treats REITs organized as trusts unfavorably compared to REITs organized as corporations, which are citizens of only one or two states. As the leading trade association representing REITs, including these publicly traded REITs organized as trusts, NAREIT has an important interest in ensuring that this Court rejects the Tenth Circuit's incorrect view.

In addition, NAREIT is uniquely well positioned to explain the history and nature of the particular business entity form at issue in this case, including the lack of any salient difference between a REIT organized as a trust under Maryland's Title 8 and a REIT organized as a corporation under the Maryland General Corporation Law.

SUMMARY OF ARGUMENT

Since the nineteenth century, this Court has recognized that entities possessing complete legal personality should be treated as citizens in their own right for diversity-jurisdiction purposes. Trusts organized under Maryland's Title 8 ("Maryland Trust REITs") possess all the hallmarks of complete legal personality. A Maryland Trust REIT like petitioner should thus be treated as having its own citizenship, as corporations are, rather than as taking on the citizenship of all its trustees and shareholders.

A Maryland Trust REIT has particular characteristics that make it materially identical to a corporation. It is a juridical entity newly created by statute, not derived from the common law. It owns property, sues, and is sued in its own name, not through its trustees. And its owners are not partners but shareholders, who all benefit from limited liability. Those characteristics also serve to distinguish this Court's cases refusing to extend citizenship-in-their-own-right status to entities like labor unions and partnerships. And to the extent that broad dicta in those cases can be read as precluding citizenship-in-their-own-right treatment even for entities like petitioner, this Court should disavow such a reading. This is not a purely statutory question: the concept of "citizenship" for diversity-jurisdiction purposes comes ultimately from the Constitution, and it is this Court's ultimate responsibility to interpret Article III.

Thus, while NAREIT agrees with petitioner that the judgment should be reversed, and that *if* petitioner is not entitled to be treated as a citizen in its own right it should have the citizenship only of its trustees, NAREIT believes that the correct approach to petitioner's citizenship need not refer to petitioner's "members" at all. Petitioner is a citizen in its own right.

ARGUMENT

This case involves not just a "trust," but a particular type of state-law entity, which this brief calls a "Maryland Trust REIT." Maryland is to REITs what Delaware is to general business corporations. About eighty percent of publicly traded REITs are orga-

nized under Maryland law. *See* James J. Hanks, Jr., *Federally Tax-Qualified Real Estate Investment Trusts Formed Under Maryland Law*, at 6 (2015) (Hanks), https://goo.gl/1MLNSX. And Maryland's Title 8 authorizes the creation of real estate investment trusts as a distinct type of entity that, as discussed in more detail below, resembles a corporation in all material ways.

This Court need not, and should not, announce a rule that applies to all trusts. Not all trusts share the same attributes relevant to diversity jurisdiction. And in the case of a Maryland Trust REIT, the relevant attributes are no different from those of a REIT organized as a corporation.[2] This Court should take due account of those attributes and hold that a Maryland Trust REIT is a citizen of Maryland and its principal place of business, just as a REIT organized as a Maryland corporation is.

In any event, the Court should answer the question presented in a way that gives Maryland Trust REITs a chance to access federal diversity jurisdiction, which is effectively impossible under the Tenth Circuit's approach. While this brief recommends an approach distinct from petitioners', both this brief and petitioners' brief explain why the Tenth Circuit's approach is incorrect and must be rejected.

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[2] Despite the name, not all REITs are organized as trusts. In fact, the majority of publicly traded REITs are organized under state law as corporations rather than as trusts—making the "T" in "REIT" something of a misnomer in those cases.

I. REITs Are Important to the U.S. Economy and Require the Protection That Diversity Jurisdiction Provides

Before determining the citizenship of a Maryland Trust REIT for diversity purposes, this Court should understand several key aspects of the governing law and the important role that REITs play in the U.S. economy. Congress promoted the formation of REITs as a way for small investors to participate in owning professionally managed and diversified real estate. As a result, many REITs today have publicly traded shares and millions of shareholders, and those shareholders may be located all over the country and, indeed, the world. Precisely because of the nature of their mission, REITs are potentially subject to suit anywhere they may own property, making the protections of diversity jurisdiction particularly important to them. That access to federal court would be impossible under any approach that requires ascertaining the citizenship of millions of shareholders who buy and sell ownership interests on public stock markets, with millions of shares changing hands each day.

A. Congress Authorized the REIT as a Vehicle for Small Investors to Own Real Estate

Although REITs are organized under state law rather than federal law, the modern REIT owes its existence to tax legislation that Congress adopted in 1960. *See* Act of Sept. 14, 1960, Pub. L. No. 86-779, § 10, 74 Stat. 998, 1003–09 (codified as amended at 26 U.S.C. §§ 856–859). This federal legislation did not create any legal entity; rather, it provided for a

special set of tax rules to cover businesses that complied with certain detailed qualification requirements. *See id.*

Congress patterned the REIT rules after the tax rules governing mutual funds, authorized two decades earlier. *See generally* Internal Revenue Code of 1954, Pub. L. No. 83-591, §§ 851–855, 68A Stat. 3, 268–74. As the House Committee on Ways and Means explained, the goal of creating a similar tax regime for REITs was to provide a means "whereby small investors can secure advantages normally available only to those with larger resources" in connection with real estate investment. H.R. Rep. No. 86-2020, at 3 (1960). These beneficial characteristics included "greater diversification of investment," "expert investment counsel," and the means of "collectively financing projects which the investors could not undertake singly." *Id.* at 3–4. Without legislation to create a model for collective real estate investment akin to mutual funds, only a select few would have the opportunity to gain from the three most fundamental benefits of real estate investment (aside from owner-occupied housing): current income, long-term capital preservation and appreciation, and investment diversification.

In general, the federal rules require that a REIT's real estate investment be undertaken for the longer term, that taxable income result from real estate-related investment, that at least 90% of the taxable income be distributed annually to the REIT's shareholders, and that the REIT be taxable as a corporation. 26 U.S.C. §§ 856(a)(3), 857(a)(1); *see generally id.* §§ 856–859.

Because of the requirement to distribute at least 90% of taxable income, REITs are uniquely unable to retain appreciable amounts of their earnings for use toward future investment. REITs must thus regularly return to the capital markets to fund new investment, thereby remaining disciplined in their use of capital and subject to the scrutiny of investors and the public. Unlike pass-through entities, such as limited liability companies that elect to be taxed as partnerships, REITs also are not generally permitted to pass through tax losses or tax credits to their shareholders.

By complying with these and other burdensome requirements, a REIT allows its shareholders to avoid double taxation to the extent a REIT distributes its income. The REIT deducts from its taxable income the dividends it pays to its shareholders when completing its federal corporate-income-tax return. *See id.* §§ 561, 857(b)(2). The dividends REITs pay are generally taxable to each shareholder at the shareholder's ordinary income-tax rate. *See id.* § 857(c). In 2014, SEC-registered REITs distributed $47 billion to shareholders.

B. Because REITs Provide Investment Opportunities for Millions of Small Investors, Their Ownership Is Often Highly Dispersed and They Are Exposed to Litigation Far from Home

Today REITs play a key role in the United States economy. Many REITs are publicly traded, meaning that they have a wide and constantly changing set of shareholders—and making the Tenth Circuit's rule

deeply problematic. And REITs hold significant amounts of real estate, exposing them to litigation far from home.

1. Petitioner is a private REIT, but many REITs, including many Maryland Trust REITs, are listed for trading on major stock exchanges. Other REITs are "Public Non-Listed REITs," which are registered with the SEC but whose shares are not listed on an exchange.

Listed REITs have billions of outstanding shares, likely owned by citizens of every state. In addition, even privately held REITs must have at least 100 shareholders. 26 U.S.C. § 856(a)(5). And the shares must be transferable. *Id.* § 856(a)(2).

The 238 REITs that are currently listed on U.S. stock exchanges have an equity market capitalization of nearly $1 trillion and help support 1.2 million jobs in the U.S. each year, both through their own operations and operations of the businesses that occupy their properties. In addition to the REIT rules, these listed REITs are subject to regulation by the SEC as well as stock exchange listing requirements. *See* Hanks, *supra*, at 10–11.

2. Today's REITs mostly specialize in owning real estate. "Equity REITs" primarily own, and often operate, income-producing properties, including apartment buildings, office buildings, data centers, hospitals, hotels, industrial facilities, telecommunications towers, shopping centers, and timberlands. Equity REITs are estimated to own more than $1.4 trillion of real estate in the United States, including

more than 120,000 properties in all 50 states plus the District of Columbia and Puerto Rico, and to account for 15–20% of the total commercial real estate market. By contrast, "mortgage REITs" primarily invest in mortgages and mortgage-backed securities, providing financing for residential and commercial properties. Mortgage REITs hold over $280 billion in residential mortgages, financing millions of homes. *See* Fed. Reserve Bd. of Governors, *Financial Accounts of the U.S.: Second Quarter 2015*, at 103.

The U.S. REIT industry—primarily through the elected burden of mandatory distribution of taxable income—has helped to foster growing interest in long-term, income-oriented real estate investment in the U.S. and, increasingly, around the world. The transparency of public REITs, together with the disciplined use of capital encouraged by the REIT rules and the public capital markets, has benefited all participants in the real-estate sector, including institutional and individual investors; providers of credit; local, state and federal governments; and regulators. *See, e.g.*, Frank Packer et al., *Securitization and the Supply Cycle: Evidence from the REIT Market*, 39 J. Portfolio Mgmt. 134, 136 (2013). REITs also make significant contributions to the economic growth and stability of the country through their development and redevelopment projects.

As a result of this track record, REITs have become widely accepted in today's investment landscape. For example, an estimated 70 million Americans directly or indirectly own REITs through their pension funds and other retirement-savings and investment accounts, including more than half a million defined-

contribution plans such as 401(k) plans. There are approximately 300 mutual funds and exchange traded funds dedicated to REITs and real estate stocks sponsored by companies like Vanguard, Fidelity, and T. Rowe Price. Further, REITs are in the vast majority of target-date mutual funds, the fastest-growing retail investment default option in 401(k) and other retirement plans.

Because so many REITs are in the business of owning and operating real property, they can at times be magnets for meritless litigation asserting state-law claims. When such claims are filed in state court, REITs face the same danger of local prejudice as large, out-of-state corporate litigants. *See Jurisdiction of Federal Courts Concerning Diversity of Citizenship: Hearing Before Subcomm. No. 3 of the H. Comm. on the Judiciary*, 85th Cong. 35–36 (1957) (statement of Judge Albert B. Maris, U.S. Court of Appeals for the Third Circuit, Chairman, Comm. on Revision of the Laws, U.S. Judicial Conference) (testifying that diversity jurisdiction protects, among others, businesses sued "in States remote from their headquarters where they don't know the local people"). But because many REITs—particularly publicly traded REITs—have shareholders living in nearly every U.S. state, the Tenth Circuit's rule would effectively deprive REITs organized as trusts of diversity jurisdiction in all, or nearly all, cases. As discussed below, this Court's precedent does not require such an extreme result.

II. Maryland Trust REITs Are Nearly Identical to Maryland Corporations and Should Be Treated as Such for Diversity-Jurisdiction Purposes

The Tenth Circuit held that there was no diversity jurisdiction based on its view that petitioner Americold Realty Trust was "a trust," and that "the citizenship of a trust is determined by examining the citizenship 'of all the entity's members.'" Pet. App. 2 (quoting *Carden v. Arkoma Assocs.*, 494 U.S. 185, 195 (1990)). Only in a footnote, quoting from the notice of removal, did the Tenth Circuit even mention what type of entity petitioner in fact is. *See id.* at 3 n.2.

Petitioner is not just any trust. Like many other REITs, it is an entity organized under Title 8 ("Real Estate Investment Trusts") of the Corporations and Associations Article of the Maryland Code—a "Maryland Trust REIT." Its citizenship should therefore turn on the characteristics of a Maryland Trust REIT, not on the general label "trust."

Under the correct analysis, a Maryland Trust REIT is a citizen of Maryland and of its principal place of business. This Court's cases (which Congress has presumptively ratified in the current diversity statute) establish that the entity itself has its own citizenship when it is a separate "juridical person"; created by state law and given its own "birth certificate"; liable for its own debts without recourse to the assets of its members; and governed not by its members but by an elected board.

A Maryland Trust REIT passes that test. Congress affirmatively structured the original REIT rules so

that REITs would be as much like corporations as possible—but could not label themselves corporations. Maryland responded by adopting what is now Title 8, the law under which Maryland Trust REITs are organized. And except for the label, Maryland Trust REITs are identical to Maryland corporations in every material way. This case thus involves an entity that is substantively much closer to a corporation than were any of the parties in this Court's previous cases about citizenship for diversity purposes. The arbitrary difference between the labels should not change this Court's analysis.

A. The Maryland Trust REIT Entity Is Identical to a Corporation in All Respects Material to the Question Before This Court

The Maryland Trust REIT has "trust" in its name, but it more closely resembles a Maryland corporation than any "traditional" type of trust. In a traditional trust, and even a traditional business trust, the trustees hold legal title to the trust corpus and manage it on behalf of the beneficiaries. *See Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 459 (1980) (describing a business trust organized under Massachusetts law). A Maryland Trust REIT, in contrast, is—like a corporation—a wholly "separate legal entity." Md. Code Ann., Corps. & Ass'ns § 8-102(2). As a result, it is the Maryland Trust REIT entity itself, rather than its trustees, that purchases and holds title to land, and that can, among other things, "[s]ue, be sued, complain, and defend in all courts," and "[m]ake contracts, incur liabilities, and borrow money." *Id.* § 8-301; *see also* Hanks, *supra*, at 10 (explaining that a Maryland Trust REIT "may engage in activities

in its own name and not in the name of its directors, trustees, stockholders, or shareholders"). As a result, a Maryland Trust REIT "is as much a separate legal person under Maryland law as a corporation." James J. Hanks, Jr., *Maryland Corporation Law* § 17.1, at 444 (Supp. 2015).

Also like a Maryland corporation, a Maryland Trust REIT is created by filing governing documents as a public record. *See* Md. Code Ann., Corps. & Ass'ns § 8-201(1); *see also id.* § 2-102 (corporation). Once formed, a Maryland Trust REIT has "perpetual existence." *Id.* § 8-301(1). If there are grounds to terminate a Maryland Trust REIT, the Attorney General may pursue dissolution exactly as he does for corporations, through an action brought "in the matter and on the grounds provided in" the corporation statute. *Id.* § 8-502(c).

Moreover, a Maryland Trust REIT is governed and managed almost identically to a corporation. *See* Hanks, *supra*, at 7–10 & App. Like corporations, Maryland Trust REITs must be governed by boards their shareholders elect. Md. Code Ann., Corps. & Ass'ns § 8-202(b)(1)(v). The members of a Maryland Trust REIT's board are called "trustees" rather than directors, but—terminology aside—their role is identical to that of corporate directors. *See id.*, Hanks, *supra*, at 8.

Shareholders in Maryland Trust REITs ("beneficiaries") occupy the same position as corporate shareholders. They have "the same right to inspect the records of the real estate investment trust as has a stockholder in a corporation." Md. Code Ann., Corps. & Ass'ns § 8-402(b)(2). They are not liable for

debts of the Maryland Trust REIT. *See id.* § 8-601; Md. Code Ann., Cts. & Jud. Proc. § 5-419(b). And if they believe that a trustee has breached his or her fiduciary duties to the entity, Maryland Trust REIT shareholders, like corporate shareholders, may enforce those duties only through a derivative suit. Hanks, *supra*, at 10.

Finally, many Maryland Trust REITs are listed for trading on major stock exchanges, particularly the New York Stock Exchange (NYSE). Stock exchanges apply the same listing criteria to Maryland Trust REITs and Maryland corporations. *See, e.g.*, Rule 5005(a)(6), *NASDAQ Stock Market Rules*, NASDAQ, http://nasdaq.cchwallstreet.com/ (last visited Nov. 11, 2015) (providing that "company" includes an "issuer that is not incorporated"); Rule 303A.00, *NYSE Listed Company Manual*, NYSE, http://nysemanual.nyse.com (last visited Nov. 24, 2015). Thus, for example, the exchanges make *both* types of entity subject to the same extensive disclosure, operational, and corporate-governance rules, including rules for director elections and the requirement that a majority of the board be comprised of independent directors. *See, e.g.*, Rules 303A.00 to 315, *NYSE Listed Company Manual*, *supra*. Major stock indices like those of Standard & Poors likewise make no distinction between corporate REITs and Maryland Trust REITs. *See REITs in S&P Indexes*, REIT.com, https://www.reit.com/investing/investor-resources/reit-directory/reits-sp-indexes (last visited Nov. 21, 2015). Nor do proxy advisors—companies that advise shareholders on corporate-governance issues—make any such distinction. A shareholder buying a share of a publicly traded REIT is thus unlikely to

perceive any difference between a Maryland Trust REIT and a REIT organized as a Maryland corporation.

B. The Maryland Trust REIT Is Called a Trust for Historical Reasons

The Maryland Trust REIT's packaging of the substantive structure of a corporation into an entity called a "trust" is an artifact of regulatory history. When Congress first authorized REITs as eligible for favorable tax treatment, it required that businesses classified as REITs be "unincorporated trust[s]" or "unincorporated association[s]" that were managed by trustees and with "beneficial ownership evidenced by transferrable shares" or certificates. 26 U.S.C. § 856(a) (1964). Congress also required, however, that for purposes of federal taxation, a REIT be an entity that would be "taxable as a domestic corporation" if it were not for the REIT rules. *Id.* § 856(a)(3) (1964). In other words, Congress wanted something that would be a corporation in all but name.[3]

Three years after Congress passed the REIT rules, the General Assembly of Maryland created the Maryland Trust REIT as a new type of business entity tailored to meet the requirements of the federal REIT rules. Consistent with the new federal REIT tax provisions, the Maryland statute provided that the

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[3] This framework was modeled after the Massachusetts business trust, a type of entity that was popular at the time for mutual funds and real estate investment. *See* H.R. Rep. No. 86-2020, at 5; Hanks, *supra*, at 3; *see also Morrissey v. Comm'r*, 296 U.S. 344, 359-60 (1935) (holding that business trusts were subject to the corporate income tax as "associations").

new form of entity would be called a "trust" and not a corporation. But it also provided more statutory structure than a traditional Massachusetts business trust, *see* note 3, *supra*, including governance mechanisms and powers that, as discussed, are very similar to those applicable to Maryland corporations. *See* Act of Mar. 14, 1963, 1963 Md. Laws 178; *see also* Hanks, *supra*, at 7–10 & App. The Maryland Trust REIT statute, as amended, is codified in Title 8 of the Corporations and Associations Article of the Maryland Code. In the years after Maryland adopted Title 8, the Maryland Trust REIT became by far the dominant form of organization for REITs nationwide. *See* Hanks, *supra*, at 5–6.

In 1976, Congress amended the REIT rules to allow, for the first time, entities organized as corporations to be treated as REITs at the federal level. Tax Reform Act of 1976, Pub. L. No. 94-455, § 1604(f), 90 Stat. 1520, 1751 (subsection entitled "Real Estate Investment Trusts May Be Incorporated") (codified at 26 U.S.C. § 856(a) (2012)). The Senate Committee on Finance explained that the prohibition on corporate REITs had "caused operating problems for some REITs under State law," S. Rep. No. 94-938, at 475 (1976), presumably in states that had not created a custom-built form of entity like the Maryland Trust REIT. After Congress lifted that prohibition, REITs gradually began to migrate to Maryland corporations (or occasionally Delaware corporations, or other business forms for state and local tax reasons). *See*

Hanks, *supra*, at 6. But many REITs today remain organized as Maryland Trust REITs like petitioner.[4]

C. Under This Court's Cases, a Maryland Trust REIT Is a Distinct Entity with Its Own Citizenship, Just as a Corporation Is.

For more than 150 years, this Court has treated corporations as having their own citizenship, not citizenship derived from their shareholders. A Maryland Trust REIT is—by design—materially identical to a Maryland corporation, and the Maryland Trust REIT likewise should have its own citizenship. While this Court has been reluctant to treat *other* artificial entities as "citizens" in their own right for purposes of Article III, Section 2, or the diversity statute, 28 U.S.C. § 1332, those decisions did not consider any entity as similar to a corporation as the Maryland Trust REIT is. As explained above, the Maryland Trust REIT was specifically constructed to comply with a federal law calling for a form of entity that would be a corporation in all but name.

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[4] A handful of REITs are organized as trusts under the laws of states other than Maryland that have their own statutory "real estate investment trust" entities, which differ to varying degrees from the Maryland Trust REIT entity. *See, e.g.*, N.D. Cent. Code §§ 10-34-01 to -09; Ohio Rev. Code Ann. §§ 1747.01–.99; Tex. Bus. Orgs. Code Ann. §§ 200.001–.503. Because petitioner is a Maryland Trust REIT, and because Maryland Trust REITs are by far the most common type of trust REIT, Hanks, *supra*, at 6, this brief focuses on Maryland Trust REITs. But a similar analysis is likely to apply to REITs organized under other states' "real estate investment trust" provisions.

1. Corporations have not been treated as deriving citizenship from their shareholders since the early 19th century. The Court briefly tried the agglomeration-of-shareholders approach, but overruled it in 1844, and since that time corporations have always had their own citizenship. Congress codified that result, with a slight modification, in Section 1332(c)(1).

The Court at first was reluctant to treat a corporation as an entity with its own citizenship. In *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61 (1809), *overruled in part by Louisville, Cincinnati & Charleston R.R. v. Letson*, 43 U.S. (2 How.) 497, 554–55 (1844) (*Letson*), the Court held that a corporation was an "invisible, intangible, and artificial being" and a "mere legal entity" and therefore was "certainly not a citizen." *Id.* at 86. The Court explained that "the corporate name represents persons who are members of the corporation," and those "real persons who come into court under their corporate name" were entitled to invoke diversity jurisdiction in a case that qualified for it. *Id.* at 91. But because the pertinent "citizens" were those "real persons" rather than the corporation itself, *Deveaux* held that there was diversity jurisdiction over an action involving a corporation only if every member of the corporation was diverse from every opposing party. *Id.* at 91–92.

Significantly, however, the Court soon thought better of *Deveaux*'s approach to corporate citizenship. In *Louisville, Cincinnati & Charleston R.R. v. Letson*, 43 U.S. (2 How.) 497, 558 (1844), the Court overruled *Deveaux* and held that for purposes of diversity jurisdiction under "the Constitution and the laws of the United States," *id.* at 552, 555, a corporation was a citizen only of its state of incorporation. The Court

explained that "the corporators as individuals are not defendants in the suit," and so it could "not see how [jurisdiction] can be defeated by some of the members, who cannot be sued, residing in a different state." *Id.* at 554. Instead, the Court held that a corporation "is to be deemed to all intents and purposes as a person capable of being treated as a citizen" of its state of incorporation for diversity-jurisdiction purposes. *Id.* at 558. The Court then reaffirmed that result in *Marshall v. Baltimore & Ohio R.R.*, 57 U.S. (16 How.) 314, 325–26, 328–29 (1853).[5]

In 1958, Congress amended Section 1332 to give corporations an additional state of citizenship. *See* 28 U.S.C. § 1332(c). In doing so, Congress merely "codified the courts' traditional place of incorporation test" for corporations and tweaked it by adding a second state of citizenship—the "principal place of business" in addition to the state of incorporation. *Hertz Corp. v. Friend*, 559 U.S. 77, 88 (2010). The passage of Section 1332(c) thus left intact *Letson*'s reasoning for according independent citizenship to corporations.

2. The Court has never addressed the citizenship of an entity as similar to a corporation as the Mary-

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[5] The Court in *Marshall* applied a different rationale from the rationale in *Letson*: it created an irrebuttable (and fictional) presumption that the shareholders of a corporation were all citizens of the corporation's state of incorporation. *See Marshall*, 57 U.S. (16 How.) at 328–29. As this Court later pointed out, however, "*Marshall*'s fictional approach appears to have been abandoned," because "[l]ater cases revert to the formulation of [*Letson*] that the corporation has its own citizenship." *Carden v. Arkoma Assocs.*, 494 U.S. 185, 194 n.3 (1990).

land Trust REIT is. The closest the Court has come was in *Puerto Rico v. Russell & Co.*, 288 U.S. 476 (1933), involving a civil-law entity, the *sociedad en comandita*. This Court held in *Russell & Co.* that the *sociedad en comandita* was to be treated as a corporation for diversity-jurisdiction purposes. *Id.* at 482. The Court explained that while the "tradition of the common law is to treat as legal persons only incorporated groups," the "tradition of" Puerto Rico's civil-law legal system was different. *Id.* at 480–81. "In the law of its creation, the sociedad is consistently regarded as a juridical person." *Id.* at 481. Indeed, the *sociedad*'s "personality is so complete in contemplation of the law of Puerto Rico that we see no adequate reason for holding that the sociedad has a different status for purposes of federal jurisdiction than a corporation organized under that law." *Id.* at 482.

A Maryland Trust REIT enjoys each of the characteristics that the Court emphasized in *Russell & Co.* A *sociedad* "may contract, own property, and transact business," and may "sue and be sued in its own name and right." *Id.* at 481. So may a Maryland Trust REIT. Md. Code Ann., Corps. & Ass'ns § 8-301(2), (4); pages 12-14, *supra*. A *sociedad* is created by a publicly filed document, *Russell & Co.*, 288 U.S. at 481, just like a Maryland Trust REIT, Md. Code Ann., Corps. & Ass'ns § 8-102(1).[6]

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[6] The Court also mentioned that the members of a *sociedad* may not intervene as defendants in a suit against the entity. *Russell & Co.*, 288 U.S. at 481. Maryland does not appear to have addressed that question explicitly with respect to Maryland Trust REITs. *Cf.* Md. R. 2-214 (governing intervention in general).

Indeed, in many ways, a Maryland Trust REIT is more akin to a corporation than a *sociedad* is. A *sociedad* provides limited liability only with respect to some partners; others face unlimited liability. *Russell & Co.*, 288 U.S. at 481. In contrast, all shareholders of a Maryland Trust REIT have limited liability, as in a corporation. *See* Md. Code Ann., Corps. & Ass'ns § 8–601; Md. Code Ann., Cts. & Jud. Proc. § 5–419(b). A *sociedad may* vest management in designated managers, and *may* endure indefinitely, if its governing documents so provide, *Russell & Co.*, 288 U.S. at 481, a Maryland Trust REIT possesses both those features by default. Md. Code Ann., Corps. & Ass'ns §§ 8-202(b)(1)(v), 8-301(1). In sum, there is no characteristic of a *sociedad* that would justify this Court's treating it as a corporation, but denying such treatment to a Maryland Trust REIT.

Two of this Court's decisions—discussed in more detail below—do raise another possible distinction of *Russell & Co.*, but that distinction is likewise inapplicable to Maryland Trust REITs. *See Carden*, 494 U.S. at 189–90; *United Steelworkers of Am., AFL-CIO v. R.H. Bouligny, Inc.*, 382 U.S. 145, 151–52 (1965) (*R.H. Bouligny*). The Court emphasized that *Russell & Co.* involved the problem of "fitting an exotic creation of the civil law into a federal scheme which knew it not." *R.H. Bouligny*, 382 U.S. at 151. Building on that statement, *Carden* explained that "at least common-law entities" were not entitled to corporate treatment under *R.H. Bouligny*. 494 U.S. at 190.

Significantly, however, the Maryland Trust REIT is *not* a common-law entity, nor even—unlike the limited partnership in *Carden*—a statutory modifica-

tion of a common-law entity. As explained above, notwithstanding the word "trust" in its name, the Maryland Trust REIT is entirely a creature of statute. *See also* Hanks, *supra*, at 5. The Maryland legislature created it to fit the mold Congress had cast in 1960: an entity providing the benefits of corporate status, including detailed statutory governance requirements not applicable to common-law entities like partnerships, without violating the (since-repealed) requirement in federal law that REITs be "unincorporated." 26 U.S.C. § 856 (1964); *see* Hanks, *supra*, at 5.

This Court therefore faces in this case a problem that is very similar to the problem it faced in *Russell & Co.*—how to fit a novel statutory creation into "a federal scheme which kn[ows] it not." 382 U.S. at 151. As in *Russell & Co.*, the Court should solve that problem by turning to the law that created the entity. And, as explained above, Maryland law gives "content to [its] declaration that the" Maryland Trust REIT "is a juridical person" in every way that Puerto Rico law did with respect to the *sociedad*, *id.* at 482, and more. *See Maryland Corporation Law*, *supra*, § 17.1, at 444. The Court should therefore hold that the Maryland Trust REIT is a corporation for diversity-jurisdiction purposes.

3. This Court has, on several occasions, declined to extend the rule of *Letson* to artificial entities other than corporations and the *sociedad en comandita*. None of those cases, however, rested on reasoning relevant to a Maryland Trust REIT.

a. The first case to suggest a different rule for unincorporated entities did so only in dicta, as the case

actually did involve a corporate defendant. *See Lafayette Ins. Co. v. French*, 59 U.S. (18 How.) 404, 405 (1855). The Court provided no reasoning; it simply stated without explanation that it "d[id] not hold, that either a voluntary association of persons, or an association into a body politic, created by law, is a citizen of a State within the meaning of the constitution" for diversity purposes. *Id.*

In *Chapman v. Barney*, 129 U.S. 677 (1889), the Court then held that an unincorporated joint-stock company organized under New York law was not a citizen of its state of organization. *Id.* at 682. Addressing jurisdiction *sua sponte*, the Court held that a joint-stock company is not a citizen of New York in its own right, and stated more broadly in dicta that the company "cannot be a citizen of New York, within the meaning of the statutes regulating jurisdiction, unless it be a corporation." *Id.* The Court described the joint-stock company as "a mere partnership." *Id.*

Joint-stock companies lacked capacity to sue in their own right; the plaintiff company had actually filed suit "in the name of its president." *Id.* at 679, 682. Similarly, the joint-stock company did not stand between its shareholders and its creditors in the way that a corporation does. In overruling *Deveaux*, *Letson* had focused on the fact that the members of the corporation were "not defendants in the suit" and "[could not] be sued." *Letson*, 43 U.S. at 554. But unlike corporate shareholders, shareholders in a nineteenth century New York joint-stock company did not did not benefit from limited liability. *See People ex rel. Nat'l Express Co. v. Coleman*, 31 N.E. 96, 97 (N.Y. 1892). As the New York Court

of Appeals explained (a few years after *Campbell*, but describing existing law), "the creation of the corporation merges in the artificial body and drowns in it the individual rights and liabilities of the members, while the organization of a jointstock company leaves the individual rights and liabilities unimpaired and in full force." *Id.*

Thus, there was ample reason not to apply the holdings of *Letson* and *Marshall* to a joint stock company, which lacked many of the pertinent aspects of a corporation. The Court did not explain the statement in dicta that *only* a corporation could have its own state citizenship; it certainly did not ground that broad statement in the reasoning of *Letson* or *Marshall*, and indeed, *Chapman* did not even cite *Letson*, *Marshall*, or *Lafayette Insurance*. *See id.* at 682.

In contrast, the Maryland Trust REIT is precisely like a corporation in all relevant respects. Maryland law provides that shareholders are not liable for the Maryland Trust REIT's debts. *See* Md. Code Ann., Corps. & Ass'ns § 8-601; Md. Code Ann., Cts. & Jud. Proc. § 5-419(b). It also explicitly provides that a Maryland Trust REIT is a "separate legal entity." Md. Code Ann., Corps. & Ass'ns §§ 8-102(2). The distinctions that justified *Chapman*'s refusal to apply *Letson* to a joint stock company are therefore wholly inapplicable to a Maryland Trust REIT like petitioner.

b. The Court again addressed entity citizenship in two cases involving limited partnerships. In the first, *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U.S. 449 (1900), the Court pointed out that the plaintiff, a "limited partnership association" orga-

nized under a Pennsylvania statute, was not a corporation. *Id.* at 454. The Court therefore explained that under *Chapman* and *Lafayette Insurance*, diversity jurisdiction depended on "the citizenship of the several persons composing such association." *Id.* at 454. That was so even though there were several similarities between a "limited partnership association" and a "corporation" as a matter of Pennsylvania law, such as capacity to sue. *See id.* at 455–57 The Court offered little explanation for that conclusion; it simply stated that the similarities were "not a sufficient reason for regarding [the limited partnership association] as a corporation within the jurisdictional rule heretofore adverted to. That rule must not be extended." *Id.* at 457. The Court then adhered to that result in *Carden*, again rejecting the argument that a limited partnership—this time, under Arizona law—was a corporation for diversity-jurisdiction purposes. 494 U.S. at 187-90.

Despite the Court's lack of explanation, however, there were again significant differences between a "limited partnership association" and a corporation as a matter of Pennsylvania law that perhaps justified the distinction in *Great Southern*. As the Supreme Court of Pennsylvania had explained, a limited partnership association possessed "*some of the characteristics* of a partnership and some of a corporation." *Hill v. Stetler*, 17 A. 887 (Pa. 1889) (emphasis added). For example, unlike corporations, which at the time required the issuance of "letters patent" by the governor, the creators of the limited partnership association were "trusted by the law to certify directly to the public without the intervening agency of the governor, and thus to give life to their own

creature." *Id.* It was therefore not clear in 1900, when *Great Southern* was decided, whether the Pennsylvania limited partnership association possessed the complete legal personality of a corporation. Likewise, in *Carden*, there was no argument that the limited partnership at issue possessed complete legal personality in the way that a corporation does. *See* Br. of Resp't at 19–31, *Carden* (No. 88-1476). Rather, the argument in *Carden* focused on similarities between shareholders and limited partners, rather than between the legal treatment of the entities themselves. *See id.*

A Maryland Trust REIT, however, does possess complete legal personality. It is formed in the same manner as a Maryland corporation—by properly filing a document with a state agency in accordance with the requirements of law. *See* Md. Code Ann., Corps. & Ass'ns § 8-102(1). Maryland law is explicit that a Maryland Trust REIT has separate legal existence. *Id.* § 8-102(2). And, moreover, a Maryland Trust REIT is governed in precisely the same manner as a Maryland corporation—by an elected board owing duties enforceable only by the Maryland Trust REIT itself or in a derivative lawsuit. *Id.* § 8-202(b)(1)(v); Hanks, *supra*, at 10.

c. Separate legal personhood was the decisive factor in *R.H. Bouligny*, in which the Court refused to treat a labor union as a corporation for diversity-jurisdiction purposes. The Court acknowledged arguments that "many voluntary associations and labor unions are indistinguishable from corporations in terms of the reality of function and structure." 382 U.S. at 150. But the Court held that corporations (and the *sociedad* in *Russell & Co.*) are "juridical

person[s]," whereas labor unions are not, absent a change in federal law. *Id.* at 150–51 (quoting *Russell & Co.*, 288 U.S. at 480-81).

This Court in *R.H. Bouligny* thus characterized its cases as turning on whether an entity was "endowed with a birth certificate," and explained that labor unions were not so endowed. *Id.* at 149. And Maryland Trust REITs *are* "endowed with a birth certificate." *See* Md. Code Ann., Corps. & Ass'ns § 8-102(1). Unlike in *R.H. Bouligny*, the argument here is not just a functional one. Whereas the labor union did not argue that it was a juridical person, but rather that the distinction should not matter, the question here is whether the Maryland Trust REIT itself *is* a "juridical person" entitled to the same citizenship as a corporation. For the reasons given above, the Court should hold that it is.

III. If This Court's Precedent Reads the Constitution to Require an Arbitrary Distinction Between Maryland Trust REITs and Maryland Corporations, the Court Should Overrule It

As discussed above, there is broad language in some of this Court's precedent that courts have read to foreclose corporate treatment for any formally "unincorporated" entity other than the *sociedad en comandita*. For the reasons just given, this language should not be read to govern the determination of citizenship status for a statutory entity as similar to a corporation as the Maryland Trust REIT. Rather, *Russell & Co.* sets out the governing rule. But if this Court disagrees, then it should re-examine the arbitrary distinction among essentially indistinguishable

legal persons. This is not an area in which the Court can cite statutory *stare decisis* and count on Congress to fix the problem. Rather, there is a real risk that this Court's decision will be read to rest on the *constitutional* term "citizen" as well as the statutory one—and on that reading, the Court would be lowering into place a constitutional ceiling that Congress could not lift. The Court should do what it did in *Letson* and adopt the correct test for citizenship of an entity like a Maryland Trust REIT, rather than adhere to the erroneous distinction between corporations and the *sociedad en comandita*, on the one hand, and everything else on the other.

The Court has recognized that such a distinction, rigidly adhered to, would be arbitrary. In *R.H. Bouligny*, the Court saw "considerable merit" and "force" to the argument that the distinction between corporations and unincorporated associations was "artificial and unreal," because "many voluntary associations and labor unions are indistinguishable from corporations in terms of the reality of function and structure." 382 U.S. at 149–51. Similarly, in *Carden*, the Court said that its approach "can validly be characterized as technical, precedent-bound, and unresponsive to policy considerations raised by the changing realities of business organization." 494 U.S. at 196. The Court went on: "Arkoma is undoubtedly correct that limited partnerships are functionally similar to 'other types of organizations that have access to federal courts,' and is perhaps correct that '[c]onsiderations of basic fairness and substance over form require that limited partnerships receive similar treatment'" to corporations. *Id.* (quoting Br. for Resp't, *Carden*, at 33).

If those distinctions were arbitrary, any distinction between a corporation and a Maryland Trust REIT would be even more so. As explained above, the Maryland Trust REIT is not merely "functionally similar" to a Maryland corporation—under Maryland law, Maryland Trust REITs are also *legally* nearly identical to Maryland corporations. Notwithstanding some differences in terminology, the legal structure and duties imposed on the Maryland Trust REIT form are the same as those imposed on the Maryland corporation, and the two have equivalent legal personality. *See* Hanks, *supra*, at 10.

The Court's response to its recognition of problems with its precedent distinguishing corporations from other entities has been to direct all complaints to Congress. For instance, in *Carden*, the Court noted that Congress had addressed corporations but not other entities in Section 1332(c), and it said that adjusting diversity jurisdiction would be "performed more legitimately by Congress than by courts." 494 U.S. at 197. Likewise, in *R.H. Bouligny*, the Court held that arguments about the arbitrary nature of the diversity rules were "addressed to an inappropriate forum, and that pleas for extension of the diversity jurisdiction to hitherto uncovered broad categories of litigants ought to be made to the Congress and not to the courts." 382 U.S. at 150–51.

But as applied to Maryland Trust REITs, such a response would be inadequate, for two reasons. First, as laid out above, it was the Court, not Congress, that created the present distinction between corporations and unincorporated entities—Congress in 18 U.S.C. § 1332(c) merely codified the traditional approach to corporate citizenship, with a tweak (one

extra state of citizenship for corporations). *See Hertz Corp.*, 559 U.S. at 88. That does not suggest that Congress adopted a strict corporations-*only* rule—which would have required statutorily overruling this Court's decision in *Russell & Co.*, a result no court has adopted. *See, e.g., Luce & Co., S. en C. v. Alimentos Borinquenos, S.A.*, 276 F Supp. 94 (D.P.R. 1967).[7]

Second, and more significant, Congress's power to adjust diversity jurisdiction is subject to the constitutional ceiling imposed by Article III, Section 2. And that constitutional ceiling is itself at least potentially affected by this Court's entity-citizenship precedent. Specifically, Article III, Section 2 requires at least "minimal diversity," which means that "any two adverse parties are not co-citizens"—

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[7] Moreover, the legislative history of Section 1332(c) confirms that Congress was concerned with two things: the volume of corporate litigation in the federal courts, and the "evil" of allowing a "local institution, engaged in a local business and in many cases locally owned, to bring its litigation into the Federal courts simply because it has obtained a corporate charter from another State." H.R. Rep. No. 85-1706, at 2, 4 (1958); S. Rep. No. 85-1830 at 2, 4 (1958) (same); *see Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 523 (1928), *superseded*, 28 U.S.C. § 1332(c). Neither of those problems implicated non-corporate entities. And so it is not surprising that no reference at all was made to non-corporate entities in the committee hearings, committee reports, and floor debates on Section 1332(c). *See Jurisdiction of Federal Courts Concerning Diversity of Citizenship: Hearing Before Subcomm. No. 3 of the H. Comm. on the Judiciary*, 85th Cong. (1957); 104 Cong. Rec. 12,683–690, 13,794 (1958). Thus, the legislative history likewise does not suggest that Congress has ratified an arbitrary distinction between corporations and non-corporate entities.

i.e., there is at least one plaintiff diverse from one defendant. *E.g.*, *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530–31 (1967). Congress cannot authorize diversity jurisdiction over suits that do not meet that constitutional requirement. *See Mossman v. Higginson*, 4 U.S. (4 Dall.) 12, 14 (1800). A holding that a Maryland Trust REIT is a "citizen" everywhere its shareholders live could thus easily be read as a *constitutional* holding as well as a statutory one—a holding Congress could not overrule.

Congress faced no such problem with respect to 28 U.S.C. § 1332(c), because the statute operated to *reduce* diversity jurisdiction below the ceiling this Court had set in *Letson* and *Marshall*. *See Marshall*, 57 U.S. at 325. By adding an additional state of citizenship, Section 1332(c) reduced the number of cases over which the federal courts had jurisdiction. Indeed, Congress expressly considered the constitutionality of Section 1332(c) under Article III, Section 2, and concluded that it was constitutional precisely because the amendment served to withdraw from the courts diversity jurisdiction that the courts had held was authorized. *See* 104 Cong. Rec. 12,686–87 (1958).

In contrast, if this Court holds that Maryland Trust REITs are "citizens" of every state where their shareholders are citizens, then Congress, to fix the problem, would need to *expand* diversity jurisdiction from the level authorized by this Court. To the extent that the Court construes the term "citizens" for constitutional purposes as well as statutory ones, Congress might doubt that such a fix would be constitutionally possible. *Compare Lafayette Ins. Co.*, 59 U.S. (18 How.) at 405 (in dicta, seeming to state that

the distinction between corporations and unincorporated entities is a construction of "the meaning of the constitution"), *with Chapman*, 129 U.S. at 682 (referring only to "the meaning of the statutes regulating jurisdiction"). Congress might fear that this Court's precedent had made suits involving Maryland Trust REITs akin to suits between aliens—*i.e.*, even if Congress were to grant diversity jurisdiction by amending Section 1332(c) to explicitly cover Maryland Trust REITs, "the legislative power of conferring jurisdiction on the federal Courts" might not extend to such a grant. *Mossman*, 4 U.S. (4 Dall.) at 14.

For that reason, if the Court believes that the distinction it has previously drawn between corporations and certain unincorporated entities is not only unexplained but unjustified—as the Court itself said in both *R.H. Bouligny* and *Carden*—then the Court should not worsen the error by extending it to the even-more-corporation-like Maryland Trust REIT and leaving the resulting situation to Congress to fix. Rather, the Court should itself adopt a more reasonable approach to unincorporated entity citizenship that considers the extent to which the entity at issue is a complete juridical person under the law that creates it, along the lines of *Russell & Co.*, 288 U.S. 476. And as explained above, such an approach would ineluctably conclude that a Maryland Trust REIT is identical to a Maryland corporation in every material way.[8]

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[8] If the Court is unwilling to adopt this approach, it should still, at a minimum, make explicit what it necessarily implied in *R.H. Bouligny* and *Carden* by suggesting that Congress fix

IV. If the Court Does Treat Maryland Trust REITs Differently from Maryland Corporations, It Should Hold That Only the Trustees' Citizenship Is Relevant

If the Court does conclude that a Maryland Trust REIT's citizenship is the citizenship of each of its "members," Carden, 494 U.S. at 192, it should still reverse the Tenth Circuit and hold that a Maryland Trust REIT's "members" consist solely of its trustees, and not of its shareholders. *See* Pet. Br. 23–26. Doing so will better reflect the business realities of the Maryland Trust REIT entity and avoid artificially treating Maryland Trust REITs as citizens of states to which they have only the most tenuous possible connection.

Most circuits to consider who constitute the "members" of an assortment of entities called "trusts" have concluded that the "members" are the trustees, not the beneficiaries.[9] Those circuits have, it is true, re-

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any problems: that the present treatment of unincorporated entities is a construction of Section 1332 only, not of the Constitution. Such a plain statement would leave Congress free to amend the statute to specify the citizenship of entities like Maryland Trust REITs.

[9] *See Erlich v. Ouellette, Labonte, Roberge & Allen P.A.*, 637 F.3d 32, 34 n.2 (1st Cir. 2011) (ERISA pension fund); *Mullins v. TestAmerica, Inc.*, 564 F.3d 386, 397 n.6 (5th Cir. 2009) (unspecified "trusts"); *Johnson v. Columbia Props. Anchorage, L.P.*, 437 F.3d 894, 899 (9th Cir. 2006) (unspecified "trust"); *May Dep't Stores Co. v. Fed. Ins. Co.*, 305 F.3d 597, 599 (7th Cir. 2002) (ERISA pension fund); *Homfeld II LLC v. Comair Holdings, Inc.*, 53 F. App'x 731, 732 (6th Cir. 2002) ("business trust"); *see also E.R. Squibb & Sons, Inc. v. Accident & Cas.*

lied principally on this Court's decision in *Navarro Savings Ass'n v. Lee* in reaching that conclusion. 446 U.S. 458, 462 (1980). And *Carden* did state that *Navarro* concerned only the distinct question of whether trustees may sue, and that "*Navarro* had nothing to do with the citizenship of the 'trust,' since it was a suit by the trustees in their own names." *Carden*, 494 U.S. at 193–94.

Nevertheless, *Navarro* discussed in detail the relationship of the beneficiaries to the trustees in Fidelity Mortgage Investors, a Massachusetts business trust. *Id.* at 459, 461–65. Even after *Carden*, that discussion is relevant to the question of whether beneficiaries constitute "members" of a trust.

The term "members" has no settled meaning as applied to a trust. Rather, as the Third Circuit has observed, "historically," the term "has not been applied in the context of a trust" at all. *Emerald Inv. Trust v. Gaunt Parsippany Partners*, 492 F.3d 192, 203 (3d Cir. 2007). In the absence of any settled legal meaning, the Court should look to business reality for guidance.

As *Navarro* explained, in a business trust the beneficial shareholders "can neither control the disposition of [the legal] action nor intervene in the affairs of the trust except in the most extraordinary situations." 446 U.S. at 464–65. The same is true of a Maryland Trust REIT. And so it would be wholly arbitrary to treat a Maryland Trust REIT as a citizen of a state merely because one of its shareholders

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Ins., 160 F.3d 925, 931 (2d Cir. 1998) (concluding that no trust was a party).

happens to have citizenship there. In *Letson* the Court could find no good reason why the citizenship of non-party shareholders, "not defendants in the suit," should destroy jurisdiction, particularly when those shareholders "cannot be sued" on a corporate liability. 43 U.S. (2 How.) at 554. Even if the Court will not follow *Letson*'s logic all the way to holding that Maryland Trust REITs, like corporations, are citizens in their own right for diversity purposes, it should at least hold that shareholders, who are "not defendants in the suit" and "cannot be sued" on a trust liability, are not "members" of the Maryland Trust REIT for diversity purposes.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

TONY M. EDWARDS
VICTORIA P ROSTOW
NATIONAL ASSOCIATION
OF REAL ESTATE
INVESTMENT TRUSTS
1875 I Street, N.W
Washington, DC 20006

JAMES J. HANKS, JR.
VENABLE LLP
750 East Pratt Street
Baltimore, MD 21202

WILLIAM M. JAY
Counsel of Record
GOODWIN PROCTER LLP
901 New York Ave., N.W
Washington, DC 20001
wjay@goodwinprocter.com
(202) 346-4000

GILBERT G. MENNA
ETTORE SANTUCCI
DAVID R. FOX
GOODWIN PROCTER LLP
Exchange Place
Boston, MA 02109

Counsel for Amicus Curiae

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